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UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA

In re: ) Case No. 15-27642-B-7  
)  
ANGELA DENISE FERREIRA, )  
)  
)  
Debtor(s). )

MEMORANDUM DECISION ON MOTION OF THE UNITED STATES  
TRUSTEE TO DISMISS CASE PURSUANT TO 11 U.S.C. §§ 707(b) (1)  
AND 707(b) (3) (B)

Introduction

Presently before the court is a motion by the United States trustee to dismiss this chapter 7 case pursuant to 11 U.S.C. §§ 707(b) (1)<sup>1</sup> and 707(b) (3) (B).<sup>2</sup> Debtor Angela Denise Ferreira has

<sup>1</sup>Section 707(b) (1) states, in relevant part:  
After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, trustee (or bankruptcy administrator, if any), or any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts, or, with the debtor's consent, convert such a case to a case under chapter 11 or 13 of this title, if it finds that the granting of relief would be an abuse of the provisions of this chapter.

<sup>2</sup>Section 707(b) (3) (B) states, in relevant part:  
(3) In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter in a case in which the presumption in paragraph (2) (A) (i) does not arise or is rebutted, the court shall consider—

[ . . . ]  
(B) the totality of the circumstances (including whether the debtor seeks to reject a personal services

1 opposed the motion. The United States trustee replied to the  
2 debtor's opposition.

3 The court has reviewed the motion, opposition, reply, and  
4 all related declarations and exhibits. Pursuant to Federal Rule  
5 of Evidence 201, the court takes judicial notice of the docket in  
6 the above-captioned chapter 7 case and the docket in the debtor's  
7 prior chapter 13 case filed in this court as case no 15-24131 on  
8 May 21, 2015, and dismissed on September 27, 2015. The court  
9 also treats the debtor's letter dated January 4, 2016, Exhibit 3  
10 to the United States trustee's motion, as an admission by the  
11 debtor under Federal Rule of Evidence 801(d)(2).

12 A hearing on the motion was held on February 23, 2016.  
13 Appearances were noted on the record. The court heard and  
14 considered the statements and arguments of counsel made during  
15 the hearing. This memorandum decision constitutes the court's  
16 findings of fact and conclusions of law pursuant to Federal Rule  
17 of Civil Procedure 52(a) made applicable by Federal Rules of  
18 Bankruptcy Procedure 7052 and 9014. For the reasons explained  
19 below, the United States trustee's motion will be GRANTED.  
20

21  
22 **Jurisdiction and Venue**

23 Federal subject-matter jurisdiction is founded on 28 U.S.C.  
24 § 1334. This matter is a core proceeding that a bankruptcy judge  
25

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26 contract and the financial need for such rejection as  
27 sought by the debtor) of the debtor's financial  
28 situation demonstrates abuse.

1 may hear and determine. 28 U.S.C. §§ 157(b)(2)(A) and (O). To  
2 the extent it may ever be determined to be a matter that a  
3 bankruptcy judge may not hear and determine without consent, the  
4 parties nevertheless consent to such determination by a  
5 bankruptcy judge. 28 U.S.C. § 157(c)(2). Venue is proper under  
6 28 U.S.C. § 1409.

7  
8 **Background**

9 The debtor filed a voluntary petition for relief under  
10 chapter 7 of the Bankruptcy Code on September 30, 2015. The  
11 debtor also filed the required Schedules and Statement of  
12 Financial Affairs with her petition. The debtor's petition  
13 states that her debts are primarily business debts.

14 The debtor's Schedules list total debt of \$165,127:  
15 Schedule D lists a \$38,496 loan secured by the debtor's 2013  
16 Acura MDX; Schedule E lists two tax claims totaling \$32,500; and  
17 Schedule F lists \$94,129 in general unsecured claims of which  
18 \$53,123 are student loans the debtor incurred to attend nursing  
19 school, leaving a remaining non-student loan balance of \$41,006.  
20

21 There is no dispute that the debtor's Acura loan (\$38,496)  
22 and the non-student loan general unsecured claims (\$41,006) are  
23 consumer debts. Undisputed consumer debts thus total \$79,502  
24 which translates to 48.14% of total debt.

25 The present dispute concerns the proper classification of  
26 the debtor's student loan debt of \$53,123. The United States  
27 trustee asserts the student loan debt is - in whole or at least  
28

1 20% attributed to child care and travel expense - consumer debt.  
2 The debtor maintains her student loan debt is non-consumer or  
3 business debt. If the United States trustee is correct, the  
4 student loan debt plus the other undisputed consumer debt will  
5 exceed 50% of the total debt which means the debts in this case  
6 are "primarily consumer debts." Zolg v. Kelly (In re Kelly), 841  
7 F.2d 908, 913 (9th Cir. 1988) ("Thus, when 'the most part'--i.e.,  
8 more than half--of the dollar amount owed is consumer debt, the  
9 statutory threshold [of § 707(b)] is passed."). If the debtor is  
10 correct, the United States trustee will have failed to satisfy  
11 its burden of demonstrating the debts in this case are "primarily  
12 consumer debts" because consumer debt will remain below the 50%  
13 threshold, in which case the motion to dismiss must be denied.  
14

#### 15 Statement of Facts<sup>3</sup>

16  
17 The debtor incurred the \$53,123 in student loans listed in  
18 her Schedules to pay for nursing school. According to the  
19 debtor, she incurred the student loans to "get an education" in  
20 the nursing profession and avail herself of additional employment  
21 and business opportunities. The debtor borrowed the maximum  
22 amount of \$10,000 per year and those funds were paid directly to  
23 the debtor and not an educational institution.  
24

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25 <sup>3</sup>The debtor did not dispute the relevant facts recited by  
26 the United States trustee in her opposition. See LBR 9014-  
27 1(f)(1)(B) ("Failure to file the separate statement [of disputed  
28 material factual issues] shall be construed as consent to  
resolution of the motion and all disputed material factual issues  
pursuant to Fed. R. Civ. P. 43(c)."). And the evidentiary record  
closed when the reply was filed. See LBR 9014-1(f)(1)(C).

1 The debtor was unemployed while she attended nursing school.  
2 Debtor's counsel confirmed this on the record during the hearing  
3 held on February 23, 2016. Because she was unemployed, the  
4 debtor states she received food stamps and shared a bedroom with  
5 her grandmother while she attended nursing school.

6 The debtor is unable to document how she spent the student  
7 loan funds. She estimates that she used \$3,000 per semester (or  
8 \$6,000 per year) for tuition and \$1,000 per semester (or \$2,000  
9 per year) for books and supplies. Since the debtor was  
10 unemployed while she was enrolled in nursing school, and  
11 consistent with statements in the debtor's letter of January 4,  
12 2016, the court can infer that the remainder of the student loan  
13 funds - \$2,000 per year - were used for travel and child care  
14 expenses. These calculations create a ratio whereby 80% of the  
15 student loans - or \$42,498.40 - were used for direct education  
16 expenses and 20% - or \$10,624.60 - were used for travel and child  
17 care expenses.  
18

19 The debtor is now employed as a nurse with the University of  
20 California, Davis. According to the debtor's pay advices, the  
21 debtor's gross monthly income is \$12,335.74 which is a little  
22 more than \$148,000 annually. The debtor's monthly "take home"  
23 pay is \$6,251.83.

24 The debtor drives a 2013 Acura MDX for which she pays \$942  
25 per month, plus an additional \$485 per month for insurance and  
26 operating expenses. The debtor makes voluntary contributions of  
27  
28

1 \$969.32 per month to a retirement plan.<sup>4</sup> She pays \$450 monthly  
2 towards student loans. The debtor also spends \$375 per month on  
3 telephone, internet, and cable.<sup>5</sup> And she spends \$280 per month on  
4 entertainment and recreation.<sup>6</sup> The debtor also claims a \$100 per  
5 month employment education expense and a \$150 per month pet food  
6 and care expense in this case that were not claimed in the  
7 chapter 13 Schedule J filed four months earlier.

8 The United States trustee has calculated, and the debtor did  
9 not dispute, that, at a minimum, by eliminating or reducing the  
10 Acura payment and voluntary retirement contributions, and by  
11

12  
13 <sup>4</sup>The debtor filed a chapter 13 petition on May 21, 2015,  
14 case no. 15-24131, and with her petition she filed a proposed  
15 chapter 13 plan. Citing Parks v. Drummond (In re Parks), 475  
16 B.R. 703 (9th Cir. BAP 2012), on June 30, 2015, the chapter 13  
17 trustee objected to confirmation of the debtor's plan on the  
18 basis that "[t]he debtors' [sic] voluntary post-petition  
19 retirement contributions [of \$801 per month] are disposable  
20 income under 11 U.S.C. § 547(b)(7) and therefore such income must  
21 be applied to make plan payments under 11 U.S.C. § 1325(b)(1)."  
22 Stating in civil minutes filed on July 21, 2015, that it intended  
23 to follow Parks the court sustained the chapter 13 trustee's  
24 objection and denied confirmation of the debtor's plan in a civil  
minute order entered on July 24, 2015. Two months later, on  
September 25, 2015, the debtor filed an ex-parte application to  
dismiss her chapter 13 case which the court granted in an order  
filed on September 27, 2015. Three days after the debtor's  
chapter 13 case was dismissed, the debtor filed this chapter 7  
case on September 30, 2015. She increased voluntary contributions  
to her retirement plan from \$801 claimed in her prior chapter 13  
case to \$969.32 now claimed in this case.

25 <sup>5</sup>This is a \$45 per month increase from the \$330 per month  
26 the debtor claimed in the chapter 13 Schedule J she filed four  
months earlier.

27 <sup>6</sup>This is a \$98 per month increase from the \$182 per month  
28 the debtor claimed in the chapter 13 Schedule J she filed four  
months earlier.

1 paying unsecured student loan debt pro-rata with all other  
2 unsecured claims, the debtor would have net monthly income of  
3 \$769.55. Elimination of or reductions to the internet, phone,  
4 and cable expense and the monthly discretionary spending for  
5 entertainment and recreation would also increase the debtor's net  
6 monthly income.

7  
8 **Discussion**

9       There are two prerequisites to dismissal under § 707(b)(1):  
10 (i) the debtor has primarily consumer debt; and (ii) the  
11 bankruptcy court finds that granting the debtor's petition would  
12 be an abuse of chapter 7. Price v. U.S. Trustee (In re Price),  
13 353 F.3d 1135, 1138 (9th Cir. 2004) (citation omitted). The  
14 Bankruptcy Code defines consumer debt as "debt incurred by an  
15 individual primarily for a personal, family, or household  
16 purpose." 11 U.S.C. § 101(8). The Ninth Circuit "look[s] to the  
17 purpose of the debt in determining whether it falls within the  
18 statutory definition." Kelly, 841 F.2d at 913 (citation  
19 omitted); see also Price, 353 F.3d at 1139; Stine v. Flynn (In re  
20 Stine), 254 B.R. 244, 249 (9th Cir. BAP 2000) ("It is the purpose  
21 for which the debt was incurred that determines whether it is a  
22 consumer debt.") (citation omitted). "Debt incurred for business  
23 ventures or other profit-seeking activities is plainly not  
24 consumer debt for purposes of section 707(b)." Kelly, 841 F.2d  
25 at 913.

26  
27       The moving party bears the burden of proof to support a  
28

1 § 707(b)(1) motion by a preponderance of the evidence. Aspen  
2 Skiing Company v. Cherrett (In re Cherrett), 523 B.R. 660, 668  
3 (9th Cir. BAP 2014) (citation omitted). The debtor, however,  
4 bears the burden of demonstrating a profit motive in order to  
5 establish that a debt is nonconsumer or a business debt. In re  
6 Palmer, 542 B.R. 289, 297 (Bankr. D. Colo. 2015); see also In re  
7 Liegey, 2009 WL 3817902 at \*4 (Bankr. M.D. Pa. 2009).

#### 8 Primarily Consumer Debts

9 The United States trustee appears to initially argue that  
10 student loans are or should be per se consumer debt because  
11 education is a benefit inherently personal, that is, it is  
12 instilled in a person's mind and can never be separated from the  
13 person. See In re Stewart, 201 B.R. 996, 1004 (Bankr. N.D. Okla.  
14 1996) ("Stewart I"); see also In re Millikan, 2007 WL 6260855 at  
15 \*5 (Bankr. S.D. Ind. 2007). The United States trustee cites no  
16 case in which a court has held that student loans are per se  
17 consumer debt and conceded during the hearing none were found.<sup>7</sup>  
18 In that regard, the court agrees with In re Rucker, 454 B.R. 554  
19 (Bankr. M.D. Ga. 2011), to the extent that court declined to  
20 adopt "a per se rule to characterize student loan debts as  
21 \_\_\_\_\_

23 <sup>7</sup>The "Stewart" line of opinions came close. In Stewart I,  
24 the bankruptcy court announced that "student loans in general  
25 should be treated as 'consumer debt,' at least absent unusual  
26 facts or factors[.]" Stewart I, 201 B.R. at 1005. The Tenth  
27 Circuit Bankruptcy Appellate Panel affirmed, but declined to  
28 adopt a per se rule. Stewart v. United States Trustee (In re  
Stewart), 215 B.R. 456, 465 (10th Cir. BAP 1997) ("Stewart II").  
The Tenth Circuit Court of Appeals affirmed and was also  
skeptical of per se rule. Stewart v. United States Trustee (In  
re Stewart), 175 F.3d 796, 806 (10th Cir. 1999) ("Stewart III").

1 consumer debt or non-consumer debt under § 707(b).” Therefore,  
2 the court declines to adopt a per se rule that holds all student  
3 loans are always consumer debt.

4 The court also questions whether it is appropriate to  
5 apportion a debt into consumer and non-consumer components and  
6 then count the consumer component under § 707(b)(1). The United  
7 States trustee has not cited a published opinion or unpublished  
8 decision in the Ninth Circuit in which an individual debt was  
9 apportioned and counted in that manner. On the contrary, at  
10 least one court in the Ninth Circuit has held this approach is  
11 improper. See In Hopkins v. Marble (In re Kempkers), 2012 WL  
12 4953076 at \*2 & n.5 (Bankr. D. Idaho 2012).

13 In Kempkers, the court examined the meaning of “consumer  
14 debt” under § 101(8) in the context of § 547(c)(9). Recognizing  
15 that it was instructed by the Ninth Circuit to determine a debt’s  
16 primary purpose, the court stated:

17 [T]he language of § 101(8) is clear that a [sic]  
18 individual debt is either entirely a consumer debt or  
19 it is not. That provision requires that a debt be  
20 categorized as a ‘consumer debt’ if the debt was  
21 incurred ‘*primarily* for a personal, family, or  
22 household purpose.’ (emphasis added). Put another way,  
23 dividing a single debt into both consumer debt and  
24 non-consumer debt is inappropriate; the total amount of  
25 a debt will be counted as consumer debt, even if a  
26 portion of it was incurred by the debtor for a business  
27 purpose.

28 Id. at \*2 (emphasis in original).<sup>8</sup>

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26 <sup>8</sup>The court also noted that its conclusion was consistent  
27 with a leading treatise discussing the apportionment issue. See  
28 Id. at n.5 (citing 2 COLLIER ON BANKRUPTCY ¶ 101.08 (Alan N.  
Resnick & Henry J. Sommer eds., 16th ed.) (“If a debt is incurred  
partly for business purposes and partly for personal, family[,]

1 The court in Kempkers did, however, recognize that the Fifth  
2 Circuit has taken a different approach to classifying debt. Id.  
3 at n.5. In In the Matter of Booth, 858 F.2d 1051 (5th Cir.  
4 1988), the Fifth Circuit counted a portion of a loan secured by a  
5 mortgage as consumer debt but attributed the balance of the same  
6 loan to non-consumer debt because part of the loan had been used  
7 by the debtor in a business venture. Id. at 1055. Apparently,  
8 the Tenth Circuit does the same thing. See Stewart III, 175 F.3d  
9 at 806-807. And so has at least one lower court. See In re  
10 McDowell, 2013 WL 587312 at \*7 and n.5 (Bankr. S.D. Tex. 2013).

11 In this case, the court need not decide whether the debtor's  
12 student loan debt may or should be apportioned into consumer and  
13 non-consumer or business components. The court need not make  
14 that determination because the debtor has failed to satisfy her  
15 burden of demonstrating that she incurred any of the student loan  
16 debt with the necessary profit motive. Put another way, the  
17 debtor has failed to carry her burden of proof on the question of  
18 whether her student loan debt is non-consumer or business debt  
19 and, thereby, excluded from the definition of consumer debt under  
20 § 101(8) for purposes of § 707(b)(1).

21 The profit motive element in the consumer debt analysis is  
22 interpreted narrowly. In Cherrett, supra, the BAP looked to the  
23

24  
25 or household purposes, the term 'primarily' in the definition  
26 suggests that whether the debt is a 'consumer debt' should depend  
27 upon which purpose predominates ... a debt should be fully  
28 classified as a consumer debt or business debt according to its  
primary purpose." ). Cherrett appears to support this conclusion  
as well in that it cited the 15th edition of Collier for a nearly  
identical proposition. Cherrett, 523 B.R. at 670.

1 primary purpose of the debtor's home loan. Upon finding the home  
2 loan was related to the debtor's employment, the BAP concluded  
3 that the home loan was not a consumer debt for purposes of §  
4 707(b)(1). The BAP noted that the debtor hoped to realize a  
5 profit from the house and that the home loan was an integral part  
6 of his employment compensation package. In reaching its  
7 conclusion, the BAP stated: "[C]ourts generally ascribe a  
8 business purpose, rather than a personal, family or household  
9 purpose to debts which are incurred 'with an eye toward profit'  
10 and which are 'motivated for *ongoing* business requirements." Id.  
11 at 669 (emphasis added, internal quotations and citations  
12 omitted).

13 Although Cherrett's "ongoing" business requirement arose in  
14 the context of a home loan, the court in Palmer, supra, adopted  
15 that narrow interpretation of the profit motive and applied it to  
16 a student loan. The court stated:

17 [I]n order to show a student loan was incurred with a  
18 profit motive, the debtor must demonstrate a tangible  
19 benefit to an *existing* business, or show some  
20 requirement for advancement or greater compensation in  
21 a *current* job or organization. The goal must be more  
22 than a hope or an aspiration that the education funded,  
23 in whole or in part, by student loans will necessarily  
24 lead to a better life through more income or profit.  
25 More than hindsight representations are needed to meet  
26 this burden.

27 Palmer, 542 B.R. at 297 (emphasis added).

28 The court in Palmer cited four rationales for its decision,  
and to support its adoption of Cherrett's narrow interpretation  
of the profit motive. Quoted at length because of their  
significance, those are as follows:

1 In determining a standard to use when dealing with an  
2 intangible asset such as a student loan, this Court  
finds that the following concepts are important:

3 1) The Tenth Circuit's reference to profit motive  
4 should be interpreted narrowly, in the context of  
5 whether student loans are consumer or non-consumer for  
6 the purposes of § 707(b). This is in keeping with the  
7 intent of the changes made to the Code in 2005. The  
8 so-called 'means test' ushered in by the Bankruptcy  
9 Abuse Prevention and Consumer Protection Act of 2005  
(*'BAPCPA'*) is based on the fundamental notion that  
10 'those who have the means to repay their creditors in  
11 whole or in part should do so.' *In re Millikan*, 2007  
12 WL 6260855 at \*6. The purpose of the means test is to  
13 'weed out chapter 7 debtors who are capable of funding  
14 a chapter 13 case.' *In re Fredman*, 471 B.R. 540, 542  
15 (Bankr. S.D. Ill. 2012). The means test and the  
16 provisions of § 707(b) apply only to an individual  
17 chapter 7 debtor 'whose debts are primarily consumer  
18 debts.' *In re Peterson*, 524 B.R. 808, 811 (Bankr. S.D.  
19 Ind. 2015). The term 'consumer' should be interpreted  
in the context of the Act in which it appears.

20 2) In *Stewart II*, the BAP noted there *may* be cases 'in  
21 which the debtor can demonstrate that the student loan  
22 was incurred purely or primarily as a business  
23 investment, albeit an investment in herself or himself,  
24 much like a loan incurred for a new business.' 215  
25 B.R. at 465 (emphasis added). 'May' is a word of  
26 limitation and means not applicable to all situations.  
27 Trying to determine, on a case-by-case basis, which set  
28 of facts equates to a business investment, rather than  
a personal investment, will be problematic without a  
narrow, objective standard to apply.

3) If the profit motive is not interpreted narrowly, it  
can be applied to virtually all student loans. It  
becomes an exception that swallows the rule. This is  
aptly pointed out in the *Millikan* case, where the court  
expressed concern with allowing a debtor, in hindsight,  
to recast the motive for incurring the debt. In many  
cases, education is initially undertaken for  
self-improvement purposes; the fact the education also  
may lead to increased earning potential is often a  
fortunate side benefit. This is why courts have  
struggled with applying the profit motive test to  
student loans: people go to school for many different  
reasons, and evaluating a given student loan debt  
according to the student's motivation can lead to  
disparate or unfair results. A student loan incurred  
by an altruistic law student seeking to work for a

1 non-profit should not, in equity, be viewed or treated  
2 differently than a loan incurred by a career-conscious  
3 law student seeking to work for a large, private law  
4 firm.

5 4) A narrow standard, tied to an existing business, or  
6 to some requirement for advancement in a current job or  
7 organization, is necessary to avoid a student's  
8 aspirational goal, or a wished-for 'hope and dream'  
9 being the focus, as opposed to the advancement of a  
10 tangible opportunity. See, e.g., Norwest Bank  
11 Worthington v. Ahlers, 485 U.S. 197, 204 (1988)  
12 (analyzing 'vague hopes or possibilities' in the  
13 context of plan confirmation, and holding the 'promise  
14 of future services is intangible, inalienable, and, in  
15 all likelihood, unenforceable,' having 'no place in the  
16 asset column of the balance sheet.').

17 Palmer, 542 B.R. at 296-297 (internal footnotes omitted, emphasis  
18 in original).

19 The court finds Palmer and its rationales for a narrow  
20 interpretation of the profit motive tied to an *existing* business  
21 purposes or an advancement in a *current* job or organization  
22 persuasive. Palmer is rooted in, and it builds upon, Cherrett.  
23 In that respect, Palmer is consistent with authority from within  
24 the Ninth Circuit. A narrow standard that looks to an "existing"  
25 business or "current" employment also places debtors on equal  
26 footing. And, in this case, it eliminates the concern expressed  
27 by the debtor that, as a single parent, she is treated  
28 differently than an unmarried debtor with no dependents.

Turning to this case, the court is not persuaded that the  
debtor has met her burden of demonstrating that she incurred her  
student loans for an existing business or for current job  
advancement. The debtor was unemployed when she attended nursing  
school and she enrolled in the nursing program to "get" a nursing

1 degree. Thus, by the debtor's own admission, there was no  
2 ongoing business related to nursing and it was not necessary for  
3 her to attend nursing school to advance in an existing job.

4 If anything, the debtor's evidence negates that she incurred  
5 her student loans for a profit motive and supports a conclusion  
6 that she pursued a nursing degree for the personal purpose of  
7 benefitting herself and her lifestyle. Whereas before the debtor  
8 obtained her nursing degree she required public assistance and  
9 shared a single bedroom, as a direct result of her student loans  
10 the debtor now makes in excess of \$148,000 per year. The debtor  
11 drives a luxury vehicle for which she is able to pay almost one-  
12 thousand five-hundred dollars per month (including payment,  
13 insurance, and operating expenses). She is able to make  
14 voluntary contributions just short of one thousand dollars per  
15 month to her retirement plan. She spends almost four hundred  
16 dollars a month on telephone, internet, and cable. And she can  
17 afford nearly three hundred dollars a month for discretionary  
18 entertainment and recreational spending.

19  
20 After reviewing the entire record in this case, the debtor  
21 has not carried her burden of demonstrating that her student  
22 loans were incurred for a profit motive. Therefore, the student  
23 loan debt that the debtor incurred to pursue her nursing degree  
24 is personal in nature and a consumer debt under § 101(8) for  
25 purposes of §§ 707(b)(1) and 707(b)(3)(B).

26 Abuse

27 The United States trustee presented substantial evidence of  
28

1 abuse in that the United State trustee has sufficiently  
2 demonstrated that by modifying and/or eliminating certain  
3 expenses the debtor would have approximately \$800 per month with  
4 which to repay creditors. And that's a conservative estimate.  
5 As noted above, the debtor did not dispute the United States  
6 trustee's calculations or the facts or evidence upon which those  
7 calculations are based in her opposition. Therefore, as to this  
8 part of the §§ 707(b)(1) and 707(b)(3)(B) analysis, the court  
9 concludes that the United States trustee has carried its burden  
10 of showing abuse under the totality of the circumstances. Kelly,  
11 841 F.2d at 915 ("But a finding that a debtor is able to pay his  
12 debts, standing alone, supports a conclusion of substantial  
13 abuse.").

#### 14 15 Conclusion

16  
17 The debtor has failed to carry her burden of proving that  
18 she incurred her student loans with a profit motive. That  
19 permits the court to treat the entirety of the debtor's student  
20 loan debt as consumer debt. And when the amount of student loan  
21 debt of \$53,123 is added to the \$79,502 in other undisputed  
22 consumer debt, the debtor's total consumer debt is \$132,625 which  
23 is over 80% of the total debt of \$165,127. That, of course, is  
24 well over the 50% threshold required under § 707(b)(1) to make  
25 the debts in this case "primarily consumer debts."

26 The court also finds that the United States trustee has  
27 carried its burden of demonstrating abuse under §§ 707(b)(1) and  
28

1 707(b)(3)(B), and that granting relief in this case would be an  
2 abuse of chapter 7. The debtor did not dispute that with minor  
3 adjustments to her expenses and spending, she has the ability to  
4 repay her creditors.

5 Therefore, the United States trustee's motion to dismiss  
6 this chapter 7 case under §§ 707(b)(1) and 707(b)(3)(B) will be  
7 GRANTED and within fourteen days of the date of the entry of the  
8 order entered on this memorandum decision the debtor shall  
9 convert her case to one under chapter 13 of the Bankruptcy Code,  
10 failing which this chapter 7 case shall be dismissed.

11 A separate order will issue.

12 Dated: February 29, 2016.

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15 UNITED STATES BANKRUPTCY JUDGE  
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**INSTRUCTIONS TO CLERK OF COURT  
SERVICE LIST**

The Clerk of Court is instructed to send the attached document, via the BNC, to the following parties:

Mikalah R. Liviakis  
2377 Gold Meadow Way, #100  
Gold River CA 95670

Jason M. Blumberg  
501 I St #7-500  
Sacramento CA 95814